No. 73-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF THE STATE OF ALASKA, RESPONDENT

Introductory. The Government's Reply Brief presents a paradox in that it both obscures and illuminates the basic issue. It is therefore deserving of this short, supplemental rejoinder by the State of Alaska.

The Obscurity. In Petitioner's original Brief, we find the unqualified and unequivocal statement: "We accept the findings of fact of the district court." (Pet. Br. p. 35 n. 35). Nowhere did the Government complain that the Findings were too broad or that they were really not Findings of Fact but conclusions. Now it would appear the Government retreats from its original admission, and, without specifying just which Findings it rejects, it claims that some of the Findings include "ultimate legal conclusions" with which it does disagree.

Conceding *arguendo* that some of the District Court's Findings are broadly stated and therefore may contain mixtures of fact and law, Alaska, as well as the Court, are left to wonder just which Findings of Fact the Government accepts and which it rejects. It is also to be noted, in passing, that the Government in seeking a writ of certiorari did not complain that the trial court had improperly stated legal conclusions under the guise of Findings of Fact.

The Government's present approach, we suggest, will set this Court upon a procedure of groping its way through a massive factual record in an attempt to sort out the nuances, details and complexities of factual matters explored by the District Court throughout the course of a lengthy trial — a procedure which is foreign to established appellate review. This serves to re-emphasize the wisdom of leaving to the Fact Finder the primary responsibility for determining the facts. In the final analysis, to do otherwise leaves this Court in a quandary as may be demonstrated below by reference to particular Findings.

Geographic Features of Cook Inlet. The Government makes much of the fact that Alaska omitted mentioning that Cook Inlet was a large body of inland water. If this omission is significant, we suggest it is even more noteworthy that the Government has been unable to find any authority for the proposition that the size of Cook Inlet defeats the emergence of historic title. Alaska recognizes that the uniqueness of Cook Inlet, including its size, does not give rise, standing alone, to historic title. But neither are the geographic features irrelevant. In this connection, the District Court made the following Findings of Fact.

"4. The geographic and economic characteristics of Cook Inlet are such that it would have been unnatural had not the inhabitants of its shores exercised continuous sovereignty over its shores and waters from the earliest times forward, with the acquiescence of foreign nations." (Pet. App. C, p. 22a)

"12. From the beginning of recorded history Cook Inlet has been vital to the economic interest of those persons inhabiting its shore; first the carrying on of the fur trade; from the late 1800's to the present, extensive fishing; and more recently, activity relating to both hard minerals and oil. (See Dr. George Rogers' testimony, Tr. pp. 596-636, and Robert DeArmond's testimony, Tr. pp. 520-570; Dr. William Hunt's testimony, Tr. pp. 474-518; Exhibits GI-HH, IY, IZ, JA, IW)

"13. All of Cook Inlet's waters have been and are such that they have been easily patrolled and protected by the government entity which has controlled its shores. (See Findings 19 through 85 below)

"14. If the United States and the State of Alaska had not controlled the fishing carried on within the disputed area of Cook Inlet, as hereinafter found, there would have been a disastrous effect upon the fish resources in Cook Inlet which had theretofore been exploited by the citizens of the United States and residents of Alaska. The landing law could not and would not have prevented the disaster. (Don Stewart's testimony, Tr. pp. 577-588)

"15. Conversely, the existence and enforcement of such fishing laws were not intended for the benefit of persons living elsewhere, as in Canada, Russia, or Japan. (Rogers' testimony, Tr. pp. 596-636; Stewart's testimony, Tr. pp.

571-596; Ex. AF-1906 Alien Fishing Act; White Act 43 Stat. 464)" (Pet. App. C, p. 24a)

In the Fact-Finding role that presumably the Government would now thrust upon this Court, how would the Government have the Court deal with these Findings. Are the Findings covered by the original statement: "We accept the findings of fact of the district court"? Or by the Government's present position: "We reject those findings which contain ultimate legal conclusions"? And how is this Court to resolve the matter?

Alleged Foreign Findings. To the Government's assertion that foreign vessels were permitted to transit and fish in Lower Cook Inlet, and to the references contained in footnote 8, p. 7, Government's Reply Brief, we would refer this Court to Alaska's Supplemental Brief before the Court of Appeals, pp. 2-5 and its appendix. There we show that foreign vessels were permitted in Cook Inlet only by license or on humanitarian grounds based on safety. As for the so-called Bransen sighting, the evidence is questionable. It is not noted in Exhibits 78 and 80 and could even have been within the admitted territorial sea of Cook Inlet. (Costello Deposition p. 30, A. 263) In weighing this evidence, the Court found against the United States. (Finding 101 Pet. App. C, p. 44a)

Explicit Claim of Jurisdiction Over Cook Inlet. If, as we suggest, the Government has now obscured the basic issue, it has also illuminated it. Alaska has never contended that the United States has made a declaration with the exact words: "We claim Cook Inlet as historic inland waters." The Government's argument, as now set forth in its Reply Brief, is that since the United States has never made such a precise claim, Cook Inlet therefore has not been claimed as a historic inland bay.

Here then we draw for the Court the basic issue that lies at the heart of this case. Alaska contends, *legally*, that the claiming nation need not use the precise words "inland waters" to establish historic title, and *factually* that the United States has nevertheless made explicit claims to Cook Inlet as a historic inland bay.

The Government's Reply Brief again demonstrates its unwillingness or its inability to come to grips with Alaska's basic position. To state or to contend legally that a claiming nation must use the words "we claim X Bay as historic inland waters" is to reveal its absurdity. There has never been such a narrow, strict, unreasonable requirement advanced by any recognized authority. None has been cited and, so far as Alaska is concerned, no such authority can be cited.

So far as the facts are concerned, they are undisputed. With the precedent of the Federal judiciary (the Kodiak Decision), the Executive Branch of the Government, first the Secretary of Commerce and subsequently the Secretary of the Interior, pursuant to Congressional mandate contained in the White Act, promulgated, distributed worldwide, and enforced continuously regulations from 1924 through at least 1957 — a period of 33 years — that defined Cook Inlet as including all adjoining waters north of Cape Douglas and west of Point Gore including the Barren Islands. This was done by these Executives in carrying out the duty imposed upon them in the White Act "to set apart and reserve fishing areas in any of the (Alaskan) waters over which the United States has jurisdiction." Some twelve areas of fisheries districts were defined. Eleven of these districts included the words "territorial coastal waters" of Alaska. (See Exhibit DX IU, 2 App. p. 1171)

Taking note of these particular words, Secretary Udall, in April 1962, stated:

> The reference to waters of the mainland shore and to territorial coastal waters surrounding Kodiak and adjacent islands evidenced the Department's intention to limit its regulatory activities under the White Act to those waters within the three-mile limit recognized as established American law. This language negates any assertion of jurisdiction over the entire waters of the Straits. (PX 98, 2 App. 831)

The point is obvious and it has never been contested by the Federal Government. If the *presence* of the words "territorial coastal waters" in the definition of eleven Alaskan areas limited an assertion of jurisdiction to the traditional three miles from the coast, the *absence* of such words in the description of the twelfth area, Cook Inlet, is as clear an assertion of jurisdiction over all of the waters of Cook Inlet as could possibly be asserted. And this definition, distributed throughout the world, was carried forward year, after year, after year.

A close analogy is found in the adjudication of Chesapeake Bay as a historic bay of the United States. There in a damage suit, in the absence of what the Government would now characterize as an "explicit claim," the Court relied upon a Congressional act defining a revenue district "xx over all the waters, shores, bays, harbors, and inlets comprehended within a line drawn from Cape Henry to

f the James River." (Stetson v. U.S., EXO
the mouth o by such reasoning, Chesapeake Bay has be-
(T. 43a)) If ric inland bay, so by the same reasoning has
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Cook Inlet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing SUPPLEMENTAL BRIEF OF THE STATE OF ALASKA, RESPONDENT, has been served upon counsel for Petitioner, Robert H. Bork, Solicitor General; Wallace H. Johnson, Assistant Attorney General; A. Raymond Randolph, Jr., Deputy Solicitor General; Gerald P. Norton, Assistant to the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, and upon Mr. Bruce C. Rashkow, Attorney, Department of Justice, and Edward F. Bradley, Attorney, Department of Justice, Washington, D.C. 20530 this 15th day of April, 1975, by hand delivery of the same.

THOMAS M. PHILLIPS
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State of Alaska